VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Trial by Jury in the Federal Courts—The VIIth Amendment.

The practice of directing verdicts in the Federal Courts is such a common one and in our judgment so far superior to the cumbrous "demurrer to evidence" that we have always regretted our General Assembly forbade such action on the part of our State judges. The simplification of trials; the speedy end of litigation; the lessening of costs are objects at which all courts should aim. Not that we for one instant desire to belittle the importance of trial by jury. Despite its drawbacks it must ever remain the sanest and best method of deciding disputes between man and man. And yet we do not believe in making a fetich of it, nor in invoking it as a charm with which to conjure away the most expeditious and reasonable way of arriving at the justice of a matter.

In the case of Slocum's Exors. *v.* New York Life Ins. Co., decided by the Supreme Court of the United States April 21st, 1913, it does seem to us that the Seventh Amendment to the Constitution is used to encumber rather than to expedite justice and the four dissenting justices seem to us to have taken the right view. Slocum was insured in the New York Life, borrowed money on his policy, failed to pay his premium, his loan was in excess of the reserve which would have carried the policy over beyond the forfeiture period; his wife paid a portion of the premium and the insured was to execute a "blue note" for the remainder—which would have been accepted in lieu of the premium —but was too ill to do so, and died before the note was executed. The evidence was that the company did not treat the check as a partial payment or in any way ratify the agent's act. The agent had no right to waive payment of the premium.

The jury found in favor of the insured, the Circuit Court having declined to direct a verdict for the defendant, though requested so to do. The company appealed. On appeal the Circuit Court of Appeals following the Pennsylvania statute, instead of sending the case back for a new trial reversed the judgment of the lower court with a direction to sustain the motion of the defendant for a judgment *non obstante veredicto.* On *certiorari* the case was brought to the Supreme Court which held that the evidence *did not admit of a finding that the policy was in force at the time of the insured's death* and that therefore the Circuit Court erred in not directing a verdict for the defendant company and that the Circuit Court of Appeals did not err in reversing the judgment; but that it did err in not directing a new trial instead of a judgment on the evidence contrary to the verdict, although the Pennsylvania Statute expressly allowed such a course.

The Supreme Court held that the decision of the Circuit Court of Appeals was an infraction of the Seventh Amendment.

> "In suits at common law where the matter in controversy shall exceed twenty dollars, the right of trial by jury all be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law."

The court cites U. S. *v.* Wonson, 1 Gall. 520; Parsons *v.* Bedford, 3 Pet. 433; Walker *v.* New Mexico, etc., Road Co., 165 U. S. 593; Capital Traction Co. *v.* Hoj, 174 U. S. 113, as authority that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly was an infraction of the Seventh Amendment because by the rules of common law the court could only direct a new trial. And this in view of the plain statement of the Supreme Court itself that the evidence adduced at the trial was not sufficient to warrant a verdict. As Judge Hughes, in his dissenting opinion, which was concurred in by JJ. Holmes, Lurton and Pitney, well says: "Wherein has any matter of fact tried by a jury been re-examined? Concededly there was no fact to be tried by a jury; the case as made was barren of any such fact; and there being none there has been no re-examination. * * * Whether there was any evidence for the jury was a question of law. The trial court in wrongly deciding it did not convert it into

a question of fact; it was not altered by the verdict, but remained the same in its nature—a question for the determination of the court. That, it seems to me, is the substance of the matter, and all else is form and procedure."

The common law certainly recognized that the function of the jury was to deal with controversies of fact. If there was a question of law it was for the court. Now there can be no question that at common law the defendant could have demurred to the evidence. A motion to direct a verdict is in reality a demurrer simplified. The trial court erred in not directing a verdict; the Circuit Court of Appeals practically did this. Is not the decision of the Supreme Court an important step backwards in this time when simplification of procedure is desired and unnecessary and protracted litigation and heaping up of costs to be deprecated. What is gained? The case goes back; a jury is impanelled, witnesses examined at great length, and then counsel for defendant quoting from the opinion of the Supreme Court solemnly asks the court to direct a verdict, as the tribunal of last resort has decided that the evidence was not sufficient to sustain a verdict, and this is done. Does it not look farcical?

The ancient ghost of this amendment must have rubbed its eyes when it was awakened from its long slumber to settle a mere shadowy form of procedure How the spectre of the other parts of our great Constitution done to death by the ruthless hands of war and of the "Police Power" and "Interstate Commerce" and other judge-made law must have smiled as the shade flitted by them from Limbo!

"O Wad Some Power!"

In the May number of the venerable old Blackwood's Magazine there is an article entitled "A Land of Law and Laxity," which is well worth perusal. The writer has evidently viewed American courts with a very observant eye and the results of his vision are not very flattering though unfortunately true.

The brand of justice with which he seems to have been best acquainted is of the North Carolina variety, but his observations fit most of the states and his conclusions as to the wrongs and

remedies are usually sane and forceful. The careless, slipshod way in which most business is conducted in our courts, the lack of dignity on the part of bar and bench, the free and easy conduct of the people in the court room, of course strike him—being an Englishman—as extraordinary. His criticisms of the failure of justice in most crimes of violence we do not think apply with as much force in Virginia as elsewhere, but much that he says we can very well take to ourselves. We cannot forbear from quoting the conclusion of his article:

"If somewhere, deep down in the ethical fibre of the people at large, there was a trifle more of the inherent desire for moral right that demands justice and reform, the findings of the juries would be less flaccid. As it is, they fall far short of fitting the punishment to the crime. For crimes of violence in especial, convictions are too woefully limited. America's common law is practically the same as the English or the Canadian law. Contrasted, in respect of convictions, with Northwest Canada, a new country much alike in social conditions and requirements to the less advanced portions of the United States, what do we find? While in the Northwest Canadian courts the convictions run to eighty per cent, in the like-conditioned territories of the States they do not average one-half that figure, and in many places they do not reach even twenty-five per cent.

"Besides the shortcomings in the administration of justice the law itself wants overhauling. Back in the eighteenth century Charles Macklin said, 'The law is a sort of hocus-pocus science that smiles in yer face while it picks yer pocket, and the glorious uncertainty of it is of more use to the professors than the justice of it.' In the States his definition still holds good. The passage of a law by one legislature, and the repealing of it by the next, and the many diverse state laws all result in the piling up of a mass of legal literature whose stodgy tomes run to the thousand. To keep an up-to-date library of jurisprudence, a lawyer would need several barns. It used to be said that 'every man is presumed to know the law.' Could he ever by any chance do so here, could a lawyer ever do so, or could the bench ever give an absolute interpretation thereof? Mangled and confused laws breed litigation, and are the ruination of the ratepayer. The paying of the legal piper in a high percentage of cases is done by the public,

and the cost of the pipe music is often greater than the amount of the original claim in dispute. In the history of the world, like conditions to these have been experienced before, in countries ancient and modern, and they have been set right. Eminent jurists of the Supreme Court are aware of the state of things. One or two, indeed, have written about it, urging reform. When altruism among the legal lights spreads wider, some change may be made. It ought to be."

The Decline in Litigation.

Any lawyer who has been at the bar three decades must have observed the steady decline in litigation. Outside of the cities the Common Law Docket has shrivelled into a beggarly array of small claims; the chancery business has fallen off in a marked degree. What is the reason for it? Are the public beginning to adopt with the lawyers the Chinese plan with the doctors: a salary as long as the patient is well, stopping with his first illness?

But as Mr. Jefferson's overseer remarked when his crops were all washed away, "Thank God, the neighbors are in the same fix!"

We find that in Great Britain there is a substantial falling off in litigation. In ten years chancery causes have decreased eleven hundred and twelve. In the High Court, proceedings begun have declined in ten years by more than ten thousand. The Law Society of Great Britain has taken the matter under serious consideration and at its last meeting there was an extended discussion of the question, which is not uninteresting reading.

"Delay, uncertainty and cost" were held not to be the chief causes. The learned president gave as his belief for the cause "the constant upsetting of decisions in the Court of Appeals and the constant upsetting of decisions below by the House of Lords."

Sir John Hollams, an ex-president, gave as his reasons "the modern practice of giving a practically undisputed right of appeal." But Sir John failed to note that appeals had fallen off by over a hundred.

The willingness to compromise and a decline in the litigious spirit was given as the chief reason by a distinguished lawyer.

Arbitration was steadily growing, especially in commercial matters, another lawyer urged as a reason.

These seemed to be the chief reasons advanced at the meeting.

The remedies suggested were: An adequate number of judges; simplification of procedure; repression of all interlocutory work; the exercise of greater care during trials, so that new trials would not be granted for misdirection or the omission to leave all proper questions of fact to juries. One lawyer urged that the publication in the daily press of large fees received by lawyers ought to be suppressed—how, he did not suggest. We would like very much to hear this question discussed by our Virginia Bar Association.

The Right to Dispose of Property by Will.

The papers have been full here lately of rather injudicious remarks made by a gentleman occupying a high place in the government as to the disposal of large estates by will and descent. Injudicious considering the source from which they came and not very well founded in reason, no matter whence they came. And yet in many countries—especially those under the civil law—a testator is not allowed to devise his property at his own sweet will. In most of the Continental countries and we believe in the State of Louisiana the power of the father to leave his property away from his family is rigidly restricted.

New Zealand, that *pater patriæ et populi,* if we may thus term a "mother country," has gone a bow-shot further. In that country there is an act (the New Zealand Protection Act) which provides that when any person dies leaving a will, but without making adequate provision for the proper maintenance and support of his wife, husband or children, the Court may at its discretion order such provision as it thinks fit to be made out of the estate.

A romantic case in which the Act was involved came before the Privy Council on appeal from the Court of Appeal in New Zealand (Allardice *v.* Allardice). The testator whose estate was in question began life as a laborer, but at his death owned property estimated to be worth over $100,000. He was divorced from his first wife, by whom he had five children. He married again,

and by his will left the whole of his property in trust for his second wife and her children. The three daughters of the first marriage had married persons in a humble station with small incomes, and the two sons were able-bodied men. The wife was provided for by the decree in the divorce suit. In these circumstances the learned judge in New Zealand was of opinion that none of the family had a claim under the Act; but the Court of Appeal reversed his decision as to the daughters, ordering 60 pounds a year to be paid to one and 40 pounds each to the other two, out of the testator's estate. The provision seemed very reasonable, and none too generous an exercise of the Court's discretionary powers, and the Privy Council upheld it. Lord Robson said, in giving the judgment of the Board, that the local courts were much more fitted to judge of the justice of such claims than the supreme tribunal in London.

We cannot but think that the civil law and the New Zealand Act are founded upon the law of right reason. Whilst we firmly believe that the right of a man to dispose of his property by will is a sacred one and so rooted in our jurisprudence as to render it wrong and unjust to forbid it, yet we believe that the State has the right to forbid the arbitrary exercise of this right, and to see that the claims of blood shall not be ruthlessly and wantonly disregarded.

We admit the force of the argument that if the State can interfere in the one case, it would have the right to do so in the other, but we think there is a wide distinction between forbidding a man to causelessly disinherit those for whose existence he is responsible, and forbidding him to make any disposition by will of his property, whether large or small.

Pure Food as between the State and the United States—Original Packages.

That the States are powerless to protect themselves against impure and adulterated foods seems a rather startling proposition. But the case of McDermott *v.* Wisconsin, decided by the Supreme Court of the United States April 7th, 1913, establishes this principle as far as articles which are the subject of interstate commerce are con-

cerned. Wisconsin had a law requiring syrups, maple sugar and articles of that character in any original container to be plainly marked with the true name of each and all of the ingredients composing such mixture. Whenever any mixture contained "glucose" in a proportion exceeding 75 per cent in weight it had to be labelled "glucose flavored," with the name of the flavoring. A retail merchant in Wisconsin purchased "Karo Corn Syrup," which had over 75 per cent of glucose and less than 25 per cent of cane syrup and which was branded "10% cane syrup and 90% corn syrup." This was sufficient under the Federal ruling of the Secretaries of the Treasury, Agriculture and Commerce and Labor. The merchant "broke" the boxes, put the goods on his shelves, and was indicted under the Wisconsin Statute and convicted of selling improperly labeled food. The Supreme Court of the United States reversed the conviction and incidentally reversed Chief Justice Marshall in Brown *v.* Maryland, 12 Wheat 419.

The court does it very ingeniously, as usual. It quotes Brown *v.* Maryland as follows:

> "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse in the original form or package in which it was imported a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

But then proceeds:

> "That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the Nation or State is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted. Leisy *v.* Hardin, 135 U. S. 100; Rhodes *v.* Iowa, 170 U. S. 412, 424; Schollenberger *v.* Pennsylvania, 171 U. S. 1,

19, et seq.; May *v.* New Orleans, 178 U. S. 496; Austin *v.* Tennessee, 179 U. S. 343; American Steel & Wire Co. *v.* Speed, 192 U. S. 500, 519, et seq.; Cook *v.* Marshal County, 196 U. S. 261; Heyman *v.* Southern Ry. Co., 203 U. S. 270, 276; Savage *v.* Jones, 225 U. S. 501, 520; Purity Extract Co. *v.* Lynch, 226 U. S. 192, 200.

In the view however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual, in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the Act, and when § 2 has been violated the Federal authority, in enforcing either § 2 or § 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

"Congress having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in § 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, territory, district, or insular possession to another for sale, or, having been transported, remaining, 'unloaded, unsold, or in original unbroken packages,' and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in the original unbroken packages.' The opportunity for inspection en route may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are *unsold,* whether in original packages or not. * * *

"The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in Brown *v.* Maryland already referred to. It was intended to protect the importer in the right to sell the imported goods, which was the real object and purpose of importation. To determine the time

> when an article passes out of interstate into state jurisdiction for the purpose of taxation is an entirely different matter from deciding when an article which has violated a Federal prohibition becomes immune. It was not intended to limit the right of Congress now asserted to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end."

But the court is silent as to the way in which the hands of the State are tied by its decision. And certainly the overruling of Brown *v.* Marshall is clear. An original package becomes now any package with a Federal label on it, which comes from one state into another, no matter if it be but one of many. The mischief of this decision is far reaching in its effect and one other line of demarcation between the State and Federal Government is wiped away.